IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1942.

No. 848 28.

THE BROTHERHOOD OF RAILROAD TRAINMEN,
ENTERPRISE LODGE NO. 27, et al.,
Petitioners,

vs.

TOLEDO, PEORIA & WESTERN RAILROAD,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITION FOR WRIT OF CERTIORARI
and
BRIEF IN SUPPORT.

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PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of the Brotherhood of Railroad Trainmen, Enterprise Lodge No. 27, et al., respectfully shows to this Honorable Court:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This petition is for review of a Seventh Circuit Court of Appeals judgment affirming an injunction in a labor dispute. There is no diversity of citizenship. The District Court for the Southern District of Illinois restrained strik-

ing employees from extensive picketing and violence. The Court of Appeals affirmed through an opinion (132 Fed. [2d] 265) by District Judge Lindley, in which Justice Sparks joined (R. 1020). Circuit Judge Minton filed a dissenting opinion (R. 1032) in which he held lack of a federal question and no jurisdiction, and also that plaintiff railroad failed to meet requirements of the Norris-La Guardia Act, in that it refused to make reasonable efforts to settle the dispute before the strike and prior to seeking equitable relief in court.

The District Court issued a temporary restraining order January 3, 1942, without notice on the day the complaint was filed. The order was extended on January 8, 1942, and again on January 16th. After evidence a temporary injunction was issued on January 19, 1942. Contempt proceedings were later brought in the District Court (R. 985-989).

SUMMARY AND STATEMENT.

Plaintiff railroad is an Illinois corporation. Its road extends from Indiana to Iowa through Illinois. It had 600 employees (R. 760), but only 104 were conductors, engineers and firemen, who went on strike December 29, 1941. In October, 1940, the two Brotherhoods became union representatives of these 104 employees, according to the Railway Labor Act. Negotiations ensued with the aid of the National Mediation Board for rates of pay and working conditions, but terminated November 6, 1941, without an agreement. The Brotherhoods called a strike for December 9th, but agreed to an indefinite postponement after the attack on Pearl Harbor. Negotiations were resumed, but an agreement was not reached. The employees, however, remained at work under the old conditions and pay.

On December 17th and again on December 28th the National Mediation Board requested the Railroad and the

employees to submit to arbitration in view of the national emergency (R. 791). The employees agreed but the employer refused and has maintained its refusal up to the present (R. 789).

On December 21st the Railroad served notice that its own rates of pay and working conditions would go into effect December 29th (R. 11). The 104 employees had the alternative to accept or withdraw from service. They quit work December 28th and plaintiff supplanted them with nonunion employees.

Picket lines were formed and there were incidents of assault and violence on December 29th, 30th, 31st and January 1st and 2nd (R. 137, 148, 171, 189). During the strike plaintiff employed twenty-nine armed guards or special agents to ride the trains (R. 784). One of the strikers, Dilley (R. 824), was shot as he stood near the right of way by a special agent in the cab of a locomotive. The only substantial damage to property was shattered glass in cabs, headlights and switches. Plaintiff did not cease operation of its road but there were some temporary delays. Two individuals were arrested (R. 82, 393, 839). The record discloses no other request for arrests during the strike. Practically all complaints of violence originated in Peoria and adjoining County of Tazewell, Illinois (main office of plaintiff). Mr. Beste, superintendent of plaintiff, testified (R. 76) that the police chief of the Village of East Peoria told him ample protection could not be guaranteed but Beste said he knew of no occasion when police refused to respond to the scene of a disturbance.

The only public official called as a witness by plaintiff was the Sheriff of Peoria. He told of a phone conversation with Mr. McNear, president of plaintiff, in which the Sheriff assured he would do all he could to protect the road but mentioned his force was limited (R. 380). This was the only occasion a representative of plaintiff

contacted this Sheriff except January 2nd (R. 382), when the Sheriff's office had a phone call about probable trouble. Deputies were immediately dispatched. On December 31st plaintiff's president requested Sheriff Donahue of Tazewell County to post deputies on twenty-four-hour duty on the lane at the entrance to plaintiff's property where the strikers were picketing. The request was complied with (R. 724). On January 2nd Mr. McNear sent telegrams to the sheriffs of eleven Illinois counties through which the road operated (R. 734, 746) and requested each sheriff to telegraph whether he would furnish protection by supplying men "to ride and convoy the trains" through the respective county. Some sheriffs did not reply. Others said they would afford protection but could not supply officers to ride the trains (R. 735).

The complaint, which cover forty pages of the printed record (R. 3-43), was filed on Saturday, January 3rd, within twenty-four hours after Mr. McNear dispatched his telegrams. An ex parte hearing was held before the Court on Saturday afternoon and a restraining order issued the same day without prior notice to defendants.

The complaint charges a federal question or jurisdiction by averring that plaintiff is subject to Acts of Congress (R. 3), i. e., "An Act to Regulate Commerce, the Railway Labor Act of U. S., and a Federal Statute entitled War Utilities." Also by averring (R. 28) that jurisdiction is invoked because of rights given plaintiff by the Constitution and Laws of the United States.

Defendants' answer denied a federal question and jurisdiction. The answer also denied averments of the complaint about violence and that public officers were unable or unwilling to furnish adequate protection for plaintiff's property. The answer averred (R. 994) that the plaintiff refused reasonable efforts to settle the dispute with the aid of governmental machinery for negotiation, mediation and voluntary arbitration.

Both by his oral announcement and written order awarding the injunction (R. 955, 976) the District Judge decided there was a federal question in the controversy and jurisdiction because of the Act of Congress, namely, "An Act to Regulate Commerce," and all acts amendatory and supplementary thereto.

OPINION OF THE CIRCUIT COURT OF APPEALS.

The Seventh Circuit Court of Appeals' opinion is reported in 132 Fed. (2d) 265 and set forth in the record (R. 1020). It also finds a federal question and jurisdiction of the subject matter because of the Interstate Commerce Act.

BASIS OF JURISDICTION OF THIS COURT TO REVIEW JUDGMENT.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended by Act of February 13, 1925, Ch. 229, Section I, 43 Stat. 938 (U. S. C. A., Title 28, § 347), providing for review by this Court by certiorari. Judgment of the Circuit Court of Appeals affirming the judgment of the District Court was entered December 16, 1942 (R. 1038). Petition for rehearing was denied January 15, 1943 (R. 1038).

THE QUESTIONS PRESENTED.

1. Whether Section 7 of the Norris-La Guardia Act (Act of March 13, 1932, Ch. 90, Sec. 7, 47 Stat. 71) did not prohibit the District Court from extending the temporary restraining order after such order had been in force five days.

2. Whether the pleadings and proof do not show absence of a federal question and lack of jurisdiction of the subject matter or that the case did not arise under the Constitution and Laws of the United States.

3. Whether there is substantial evidence that public officers were unable or unwilling to furnish adequate protection for plaintiff's property, which evidence is a condition precedent to a labor injunction by the terms of Section 7 (e) of the Norris-La Guardia Act (Act of March 23, 1932, ch. 90, Sec. 7, 47 Stat. 71).

4. Whether the facts show that plaintiff failed to exercise reasonable efforts to settle the dispute with the aid of governmental machinery as required by Sec. 8 of the Norris-La Guardia Act (Act of March 23, 1932, Ch. 90, Sec. 8, 47 Stat. 72), preliminary to an injunction in a labor dispute.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(1) The Circuit Court of Appeals has decided the important question of jurisdiction of the subject matter contrary to applicable decisions of this Court. The majority opinion adopts a new rule without congressional sanction and is such a departure from the accepted rule of jurisdiction that it greatly expands the province of federal courts over local affairs.

(2) The Circuit Court of Appeals has construed important provisions of the Norris-La Guardia Act in a manner which apparently unsettles the clear intent of these provisions. This act has frequent application to a current field of litigation and the provisions in question have not yet been passed on by this Court.

(3) The lower courts have made findings of fact which are unsupported by substantial evidence.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit

Court of Appeals for the Seventh Circuit, commanding that Court to certify and to send to this Court, for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on the docket, No. 7951, Toledo, Peoria & Western Railroad, Plaintiff-Appellee, v. The Brotherhood of Railroad Trainmen, Enterprise Lodge No. 27, et al., Defendants-Appellants, and that the said judgment of the United States Circuit Court of Appeals for the Seventh Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

THE BROTHERHOOD OF RAILROAD TRAINMEN, ENTERPRISE LODGE NO. 27, et al.,

By JOHN E. CASSIDY,
LOUIS F. KNOBLOCK,
JOHN F. SLOAN, JR.,
Attorneys for Petitioners.

BRIEF

In Support of Petition for Writ of Certiorari.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court is not officially reported. The record, however, contains the oral announcement of the trial judge when the writ was granted. The opinion of the Seventh Circuit Court of Appeals was filed December 16, 1942, No. 7951. Petition for rehearing was denied January 13, 1943 (R. 1038). It is reported in 132 Fed. (2d) 265 and set forth in full at page 1020 of the record.

JURISDICTION.

The statutory provision sustaining the jurisdiction of this Court to review the judgment of the Circuit Court of Appeals is Section 240 (a) of the Judicial Code as amended by Act of February 15, 1925, Chapter 229, Section I, 43 Stat. 938 (U. S. C. A., Title 28, Sec. 347).

STATEMENT OF THE CASE.

Petitioners believe the recital of facts contained in the "Summary Statement" in the accompanying petition for writ of certiorari constitutes a sufficient statement to serve this Court in its consideration of this brief. The same is, therefore, hereby adopted and made a part hereof.

SPECIFICATION OF ERRORS.

(1) The lower courts erred by permitting an extension of the temporary restraining order beyond five days because Section 7 of the Norris-La Guardia Act declares that such an order **"shall be effective for no longer than 5 days and shall become void at the expiration of said 5 days."**

(2) The District and Appeals Courts erred by deciding that the controversy presented a federal question and by holding jurisdiction of the subject matter.

(3) The evidence did not show that public officers were unable or unwilling to furnish adequate protection for plaintiff's property. Section 7 (a) of the Norris-La Guardia Act requires such a showing as a condition precedent to an injunction and the lower courts erred in their refusal to dismiss the complaint on this ground.

(4) The law (Norris-La Guardia Act, Sec. 8) prohibits injunctive relief in a labor dispute to any complainant who has failed to make every reasonable effort to settle such dispute with the aid of governmental machinery. Plaintiff admits its refusal to comply with the request of the National Mediation Board for voluntary arbitration. The District and Appeals Courts erred by awarding the injunction under these circumstances.

ARGUMENT.

SUMMARY.

I. The temporary restraining order was issued January 3, 1942. Section 7 of the Norris-La Guardia Act clearly states that this order was effective "**FOR NO LONGER THAN FIVE DAYS AND VOID AT THE EXPIRATION OF FIVE DAYS.**" On January 8, 1942, the District Court (R. 66) ordered an extension of the same order for a period of nine days, and on January 16, 1942, the Court again ordered (R. 965) that the order of January 3, 1942, should be extended for a period of three additional days. The clear language of the statute prohibits these extensions, and the Circuit Court of Appeals should have decided that the orders were void.

II. Neither the complaint nor evidence demonstrates that a decision of this controversy requires the application or construction of the Constitution or any law of the United States. For this reason the suit should have been dismissed for lack of federal jurisdiction of the subject matter. The Appeals Court expressly concedes the long-established rule, but holds (R. 26) that because the Interstate Commerce Act imposes certain duties on a common carrier that a federal court has jurisdiction to restrain third parties not regulated by the Commerce Act (striking employees) from interfering with the performance of such duties by the carrier. But the opinion of the Circuit Court of Appeals declares: "The Interstate Commerce Act includes no specific provision as to restraint of violent strikes against a carrier engaged in interstate commerce at the suit of the carrier" (R. 1024). By its own language the opinion admits a lack of legislative foundation for the injunction and the absence of a federal law as a basis for jurisdiction. The

opinion announces a new doctrine of enlarged jurisdiction for injunctions and other common-law remedies without congressional sanction, and should not be allowed to stand.

III. Section 7 of the Norris-La Guardia Act requires a finding that public officers are unwilling or unable to protect property as a condition precedent to an injunction. Under Illinois law the same finding would be sufficient to remove a sheriff from office and to impugn the sovereign competency of the state. The Sheriff has the power to deputize practically all adult citizens and the Governor has the duty to employ the militia. There is no evidence the Governor was requested to act in this controversy. There were but 104 men on strike. Plaintiff had twenty-nine armed guards, and the evidence fails to show that local officers were unable or unwilling to perform their duty to protect property.

IV. The strike was provoked by plaintiff's declaration of December 21, 1941, that its own rates of pay and working conditions would go into effect December 29th. Plaintiff knew these conditions were unacceptable to the men. The employees were then at work and no strike order was pending. The employees had agreed on December 17th to submit to voluntary arbitration at the request of the National Mediation Board. They repeated their willingness to do this on December 28th. The nation was then at war and a national emergency existed. The employer refused these same requests for arbitration which would have prevented the strike. Section 8 of the Norris-La Guardia Act prohibits an injunction when the evidence shows that a complainant has failed to exercise reasonable efforts to settle the dispute by arbitration. By the law and this evidence the injunction was prohibited and should have been denied.

I.

The statutory language that "**such temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of five days**" is so clear there is no doubtful meaning for construction and the orders of the District Court (R. 66, 965) extending the restraining orders for an additional eleven days were void. The Circuit Court of Appeals held (R. 1022) that the purpose (of this part of the statute) was "to prevent possibility of irreparable damage and to preserve the existing status until an early hearing would determine whether or not a temporary injunction should be issued." There is nothing in the act to sustain this finding and the Court's conclusion amounts to a reading of new language into the act.

This Court stated, in United States v. Standard Brewery Co., 251 U. S. 210, 217, 64 L. ed. 229, 234:

> "Nothing is better settled than that, in the construction of a law, its meaning must first be sought in the language employed. If that be plain, it is the duty of the courts to enforce the law as written, provided it be within the constitutional authority of the legislative body which passed it."

The Congress said the restraining order was void at the end of five days and the act provides no qualification or exception. If a District Court can make one extension for some purpose, it can make twenty extensions or more for any or all purposes. The act prescribed a rigid limitation and imposed an inflexible necessity on the complainant and the Court to complete the hearing for temporary injunction within five days, if it desired that there be an injunction from the expiration of the restraining order.

The basic purpose of the Norris-LaGuardia Act is to exclude injunctive relief by federal courts in labor disputes

except in the most extraordinary and extreme situations. A showing for temporary injunction does not require repetitious evidence. A prima facie case is sufficient. If the Court can extend the restraining order in all cases until a hearing for an injunction is completed and is not limited as to the length of the hearing, the statutory five days limitation for the restraining order is subject to judicial nullification. The Court of Appeals also held that if the temporary injunction in this case was proper that the restraining order merged in the injunction and the restraining order was not before that Court. To sustain that view the Court cited City of Reno v. Sierra Pacific Power Co., 44 Fed. (2d) 281, 283 (C. C. A. 9). That case is for injunctive relief to enjoin a municipality from interfering with water meters. It does not embrace a labor dispute and is not limited by the Norris-LaGuardia Act. A reading of the opinion will disclose additional distinctions, but this is sufficient that the decision is not pertinent to this case at bar.

This section of the Norris-La Guardia Act has not been passed on by this Court. If the restraining order was void between January 8 and January 19, 1942, it will not sustain contempt proceedings that may be brought because of alleged occurrences during that period. The issue is alive and should be determined by this Court.

II.

Diversity of citizenship is not in this case and a United States court is without jurisdiction unless a federal question is presented by the complaint and evidence. The test for determining the existence of a federal question and consequent jurisdiction as pointed out in the dissenting opinion (R. 1023) has been settled since the opinion of Chief Justice Marshall in Cohen v. Virginia, 6 Wheat. 263, 279, 5 L. ed. 257, 285. The rule has recently been restated

in Peyton v. Railway Express Agency et al., 316 U. S. 350, 353, 86 L. ed. 1525 (decided May 25, 1942), in which this Court said:

> "Whether a suit arises under a law of the United States must appear from the plaintiff's pleading, not the defenses which may be interposed to or be anticipated by it. Petitioner's pleading, which we have summarized, satisfies this requirement since it adequately discloses a present controversy dependent for its outcome upon the construction of a Federal statute."

The majority opinion in this case (7th C. C. A.) (R. 1023) concedes the rule in the following language:

> "To give rise to Federal Jurisdiction, the basis of the suit must be concerned with the validity, construction, enforcement or effect of the statute; anything less is insufficient."

The authorities (decisions of this Court) to which reference is made in the dissenting opinion, particularly Gully v. First National Bank, 299 U. S. 109, 112, 114, 57 S. Ct. 96, 81 L. Ed. 60, 72 (opinion by Justice Cardozo), clearly explain that a suit does not arise under the laws of the United States with consequent jurisdiction in a federal court unless it "**really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends,**" and that "**the federal nature of the right to be established is decisive—not the source of the authority to establish it.**"

In this case plaintiff bases its claim for federal jurisdiction upon the theory (alleged in complaint, R. 3, 28) that because interstate commerce is involved and the Federal Constitution authorizes Congress to legislate in that field and because Congress has passed an act to regulate com-

merce and has enacted the Railway Labor Act and a federal statute called "War Utilities" a federal question is created in this labor dispute.

The complaint does no more than aver a general reference to the statutes. It does not specify any provision or attempt to charge how the construction or effect of the Interstate Commerce Act or other federal law is necessary to decide whether striking employees of plaintiff should be restrained. We contend that under the rule repeatedly announced by this Court and well stated in Norton v. Whiteside, 239 U. S. 144, 147, 36 S. Ct. 97, 60 L. ed. 186, 187, that the complaint is insufficient to support the action and the suit should have been dismissed by the District Court on the pleading or, better stated, that a dismissal should have been granted because the complaint disclosed a clear absence of a federal question and lack of jurisdiction.

The majority opinion (C. C. A.) affirmed jurisdiction of the subject matter because it conceived that determination for an injunction against striking employees required the construction and enforcement of some provisions of the Interstate Commerce Act. The opinion acknowledges that because "Congress has power to legislate in certain fields is insufficient to confer jurisdiction" and that "the mere fact that interstate commerce is involved and may be affected is not sufficient to justify jurisdiction of a private suit seeking protection of such commerce," and the opinion points out that **"the commerce Act includes no specific provision as to restraint of violent strikes against an Interstate carrier at the suit of the carrier."** However, the appeals court sustained jurisdiction because the Commerce Act requires a carrier to provide reasonable and safe facilities and prohibits abandonment of all or any part of a road without authority of the Commerce Commission and because a federal statute provides criminal liability for one who derails a car or destroys a facility,

etc., used in interstate commerce. The conclusion of the Court in behalf of jurisdiction is thus stated (R. 1026):

> "It cannot be that Congress imposed duties and yet intended that the carrier should be denied Federal relief from interference with carrying out such duties. Congress having set up certain requirements which the carrier must meet when others seeking to prevent it by violence from meeting those statutory obligations it should be permitted to seek protection in a Court of equity of the sovereignity imposing the obligation."

A decision for this injunction does not require a construction or enforcement of the mentioned criminal statute and plaintiff's right to be free from violent interference by striking employees in the conduct of its business does not spring from any provision of the Interstate Commerce Act. Neither the Interstate Commerce Commission, a shipper or anyone is complaining in this case that plaintiff did not perform its duties specified by that act or is anyone charging that plaintiff abandoned any part of its road.

We suggest that the majority opinion confuses plaintiff's common law right to be free from violent interference with its statutory duties prescribed by the regulatory commerce act. The complaint here is by the carrier itself and the charge is that **plaintiff has a right** to be free from interference by its striking employees in the performance of its business. **Plaintiff is complaining about that common law right.** No one is charging it with failure to perform duties under the commerce act. The right of plaintiff and every owner of property to be free from violent interference existed before the Commerce Act was passed. That statute did not enlarge or federalize the right, neither did the Commerce Act originally create plaintiff's natural right to engage in business. The statute was designed to regulate the carrier for the larger good of the public.

It was not the intention of Congress through the Interstate Commerce Act to regulate third parties (striking employees), but only the carriers themselves. Neither did Congress propose through this statute to regulate or solve labor disputes. The history of the act shows it was passed to curb railroad practices which were affecting the general welfare. In review of the events which lead to the law this Court stated in Texas & R. R. Co. v. I. C. C., 162 U. S. 197, 210, 40 L. ed. 940, 944:

> "From the very nature of the case, therefore, railroads are monopolies, and the evils that usually accompany monopolies soon began to show themselves, and were the cause of loud complaints. The companies owning the railroads were charged, and sometimes truthfully, with making unjust discrimination between shippers and localities, with making secret agreements with some to the detriment of other patrons, and with making pools or combinations with the other, leading to the oppression of entire communities . . .
>
> "As, however, the powers of the states were restricted to their own territories, and did not enable them to efficiently control the management of great corporations whose roads extended through the entire country, there was a general demand that Congress, in the exercise of its plenary power over the subject of foreign and interstate commerce, should deal with the evils complained of by a general enactment, and the statute in question was the result."

When the Congress passed the Commerce Act it had a right to and did assume that the states would continue to enforce elementary police powers for the protection of all property, whether the property was used in interstate business or otherwise. Whether Congress should provide for injunctive relief against striking employees at the suit of a carrier because the Commerce Act regulates carriers for the benefit of shippers and the public is not a question for the Court, but instead a subject for legislative deter-

mination. The controlling fact is that Congress has not so legislated, and in the absence of such legislation an interstate carrier has no greater or different rights to be free from interference by its striking employees than those enjoyed by any other citizen. **The right of this plaintiff to have its property protected against violence from striking employees is not of federal origin or nature, but is a right uniformly enjoyed by all citizens, irrespective of the character of their business.**

A right such as contended for by plaintiff in this case not having its origin or grant in a federal law, is for enforcement by state courts and one over which federal courts are without jurisdiction.

The majority opinion (C. C. A.) cites In re Lennon, 166 U. S. 548, to support jurisdiction. That case was decided in April, 1897. It was a habeas corpus proceeding which emanated from an injunction granted by the Circuit Court in Toledo, Ann Arbor and Northern Michigan Ry. Co. v. Penn., 54 Fed. 730. It was an action instituted by plaintiff, an interstate carrier, against eight railroad companies and a labor union constituted of employees of one of the defendant carriers. The complaint charged that defendants and the employees of one defendant refused to accept freight from plaintiff and that defendants were accordingly violating the duty imposed on them by the second paragraph of Section 3 of the Interstate Commerce Act, which provides that all common carriers shall afford reasonable and equal facilities for the interchange of traffic. Plaintiff prayed for a mandatory writ requiring defendant carriers to perform this duty imposed by the Commerce Act and the prayer was allowed.

This decision was almost a half century before the Norris-La Guardia Act, which prohibits an injunction to compel employees to work under any circumstances. Norris-La Guardia Act, March 23, 1932, Ch. 90, Sec. 4,

Subparagraph (a), 47 Stat. 70. Moreover, it is completely different from this case at bar because it is bottomed on the statutory violation by the defendants in refusing to accept interstate freight. The complainant there was the proprietor of a clear statutory right to have its freight accepted by the connecting carriers and the defendant railroads had a statutory duty to accept it. The purpose of that suit was to force acceptance of freight. The purpose of the present action is to forbid striking employees from interference with plaintiff's property. On page 553 of the opinion written by former Justice Brown of this court, the Court said:

> "There could be no doubt of the power of the Court to grant this injunction which bore solely upon the relations of the railway companies to each other."

We desire to briefly demonstrate the factual differences between other cases cited in the majority opinion (C. C. A.).

In Wabash Co. v. Hanahan, 121 Fed. 563, an injunction was sought to restrain officers of a labor union from ordering a strike. The District Judge denied the injunction on the facts. The jurisdictional question was but superficially considered and sustained on authority of Toledo Ry. Co. v. Pennsylvania Co., 54 Fed. 730, explained in one of the preceding paragraphs of this argument.

There are many distinctions between this Hanahan case and the proceedings at bar, but it is sufficient to note that under the prohibition of the Norris-LaGuardia Act (since enacted) such an injunction could not now be allowed to restrain union leaders and employees from striking for a wage increase.

Knudsen v. Benn, 125 Fed. 636, was an oral opinion of a District Judge in a suit to enjoin members of a union not employees of plaintiff from inducing plaintiff's employees to strike. The opinion does not show what the complaint

charged, and the only reference to the question of jurisdiction is this meager statement: "The acts here charged constitute an interference with interstate commerce and I suppose some matters are stated mainly to show that it is a case over which a federal court has jurisdiction." Nor does it appear what are the facts referred to as "some matters."

Stephens v. Ohio State Telephone Co., 240 Fed. 759, was a suit by subscribers of a telephone company to compel the company to furnish telephone facilities to them. The Court held it had jurisdiction because the Interstate Commerce Act gave plaintiffs the right to obtain reasonable facilities for telephone service. Since the suit was based on this right granted by a federal statute, it arose under the laws of the United States.

In King v. McLean Asylum of Massachusetts General Hospital, 64 Fed. 331, jurisdiction was based on diversity of citizenship. There was no question of jurisdiction involved.

Richards v. Town of Rock Rapids, 31 Fed. 505, raises the validity of a tax assessment on National Bank shares. The federal jurisdiction was based on Section 5211 of the Revised Statutes of the United States, which prohibited discriminatory taxation against such shares. It was claimed that the tax violated the right given by that federal law.

In Iowa Loan & Trust Co. v. Fairweather, 252 Fed. 605, plaintiff sought to resist the imposition of a state tax upon Liberty bonds. The Act of Congress providing for the issuance of such bonds declared that they should be exempt from all taxation. It was held that a federal question was involved because plaintiff's case was based on this right to be free from taxation granted him by federal statute.

Southern Pac. Co. v. Peterson, 43 Fed. (2d) 198, was an injunction suit against the Attorney-General of Arizona to restrain the enforcement of the State Train Limit Law on

the grounds that the state law was in violation of the Constitution of the United States.

In Kentucky & I. Bridge Co. v. Louisville & N. R. Co., 37 Fed. 567, after a hearing by the parties before the Interstate Commerce Commission, the defendant refused to comply with the order of the Commission directing the defendant to receive traffic from plaintiff. Suit was filed in the federal court to force compliance with the Commission's order. Such a suit in the District Court is specifically provided for in Section 16 (12) of the Interstate Commerce Act.

Oregon R. & Navigation Co. v. Campbell, 173 Fed. 957, was a suit by a railroad to restrain the Oregon State Board of Commissioners from putting into operation and effect a schedule of freight rates on plaintiff's railroad in the state. It was charged by the railroad that the schedule was confiscatory and deprived plaintiff of its property without due process of law in violation of the Fourteenth Amendment to the Constitution.

Glenwood Light etc. Co. v. Mutual Light etc. Co., 239 U. S. 121, 60 L. ed. 174, 36 Sup. Ct. 32, was a suit brought by one public utility to restrain another utility from maintaining its poles and wires on the same side of the street as plaintiff. Plaintiff and defendant were citizens of different states and federal jurisdiction was invoked on that ground. The only question in the case was whether or not the amount in controversy was in excess of $3,000.00.

Carmichael v. Anderson, 14 Fed. (2d) 166, was a suit by the holder of one federal radio license against the holder of another license to broadcast on the same wave length. It was held that the controversy involved an interpretation of the federal licenses and the federal statute under which they were granted. In so doing, the case involved a federal question.

The expansion of federal jurisdiction that would result from the rule announced in the majority opinion (C. C. A.)

demonstrates the wisdom of the established jurisdictional test so frequently stated by this Court. Puerto Rico v. Russell & Co., 284 U. S. 476, 483, 77 L. ed. 903, 909; Louisville & Nashville R. Co. v. Mottley, 211 U. S. 149, 152, 29 S. Ct. 42, 53 L. ed. 126, 127.

According to the Circuit Court of Appeals, if a federal statute imposes a duty upon a person, judicial interpretation may read into that statute a provision that such a person has an implied federal right to be free from any act tending to obstruct or prevent the performance of that duty, and a federal court will hear cases seeking remedies for a breach of such an implied right. We suggest the vast number of duties imposed on various classes of persons by the laws of the United States. The official 1940 edition of the U. S. Code covers 4,500 large pages of fine type.

A great volume of litigation in state courts comes from automobile negligence cases. Federal law imposes upon common carriers by truck the duty to furnish transportation and facilities (Part II of the Interstate Commerce Act, Section 16, Act of June 29th, 1938, ch. 811, Sec. 16, 52 Stat. 1240, U. S. C., Title 49, Sec. 316). Assume a motorist damages a truck, thereby impeding interstate commerce. Under the reasoning of the Circuit Court of Appeals the trucker would have a federal right to be free from any act obstructing or impeding the movement of the truck, and a remedy in the federal courts for his damage.

All other interstate carriers have similar duties: Water carriers (Part III of the Interstate Commerce Act, Sec. 305, Act of Sept. 18, 1940, ch. 722, Title II, Sec. 201, 54 Stat. 934, U. S. C., Title 49, Sec. 905); telegraph companies (Act of Aug. 7, 1888, Ch. 772, Sec. 2, 25 Stat. 383, U. S. C., Title 47, Sec. 10); telephone, telegraph and radio companies (Communications Act of 1934, Sec. 201, Act of June 19, 1934, Ch. 652, Sec. 201, 48 Stat. 1070, U. S. C., Title 47, Sec. 201); air carriers (Civil Aeronautics Act of 1938, Sec.

401, Act of June 23, 1938, Ch. 601, Sec. 401, 52 Stat. 987, U. S. C., Title 49, Sec. 481); power companies (Federal Power Act, Act of June 10, 1920, Ch. 285, Sec. 201, U. S. C., Title 16, Sec. 824); pipe line companies, express companies, sleeping car companies [Interstate Commerce Act, Sec. 1; Act of Feb. 4, 1887, ch. 104, part I, 24 Stat. 319, as amended, U. S. C., Title 49, Sec. 1 (3)]. Under the majority opinion such carriers would have similar implied federal rights and U. S. courts similar jurisdiction.

Interstate commerce has been widened until it now touches nearly all phases of a citizen's life. The Food and Drug Law prescribed federal duties with respect to his food and drugs. Packers and stockyards have federally imposed duties. Security exchanges are subject to federal law as are public utility holding companies, investment companies and investment advisers. Other millions have duties imposed upon them by federal law. Following the reasoning of the Circuit Court of Appeals, each of such duties would create corresponding federal rights that could be enforced in federal courts. This was never intended by Congress.

III.

The evidence is insufficient to show that the public officials were unable or unwilling to furnish adequate protection for plaintiff's property as required by Section 7 of the Norris-La Guardia Act.

This section (Act of Mar. 23, 1932, Ch. 90, § 7, 47 Stat. 71) provides in part:

> "No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute . . . except after findings of fact by the court to the effect—

"(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection."

Plaintiff's evidence relates to incidents of disturbance and violence on December 28th, 29th, 30th, 31st and January 1st and 2nd, practically all of which occurred in Illinois and adjoining counties of Peoria and Tazewell. There were but 104 men on strike (R. 760) on a railroad which extended from Indiana to Iowa. Plaintiff had twenty-nine armed guards (R. 784), who rode its trains; so there was one armed guard for every 3.5 strikers. There were but two arrests and no request for additional arrests (R. 393).

The Tazewell Sheriff posted deputies for 24-hour duty at the lane where the picketing was conducted (R. 724). The damage to plaintiff's property amounted to broken glass in the headlights and cabs of locomotives, the lamps of switches and cabooses. Although the Sheriffs of Peoria and Tazewell cautioned plaintiff's president that their staffs were limited, there is no evidence that either Sheriff did not act for the suppression of violence and preservation of order. There was only one specific request to the Peoria Sheriff (R. 382). On January 2nd, the day before the complaint was filed in court, plaintiff's president, Mr. McNear, dispatched telegrams to the mayors of cities and sheriffs of Central Illinois Counties requesting these officials to furnish officers to ride upon and convoy trains through their respective jurisdictions (R. 734). The officials who replied assured they would protect plaintiff's property but said they were not in a position to furnish deputies to ride the trains (R. 735).

There is no evidence that police officers and sheriffs were unable to handle any disturbance or situation to which their attention was called or which came to their notice. There is no evidence that the Governor was requested to

act because of violence or disturbance. In fact, there is no proof that the chief executive of the state was notified. Under our form of government a sovereign state such as Illinois has the clear duty and unfettered power to protect the property of all its citizens, whether they are engaged in interstate transportation or any other business. The federal government was not designed or empowered to enforce local rights for the protection of property.

In Arkansas v. Kansas T. & T. Co., 183 U. S. 185, 188, 46 L. Ed. 144, 146, which was an injunction suit, this Court, speaking through former Chief Justice Fuller, said:

> "The police power was appealed to, the power to protect life, liberty, and property, to conserve the public health and good order, which always belonged to the states, and was not surrendered to the general government, or directly restrained by the Constitution."

Illinois counties are subdivisions of the sovereign state. They were created by the people for the administration of state law. Each county has a sheriff who is "the principal executive officer of the county and may exercise the powers of the sheriff at common law." The People v. Nellis, 249 Ill. 12, p. 23 (decision of Illinois' highest court). The statutes of this state provide: "Any sheriff may call to his aid, when necessary, any person, or the power of the County" (Smith-Hurd Illinois Rev. Stat., Ch. 125, Sec. 18). Cities and villages of the state are likewise subdivisions of the sovereignty and they exist for the purpose of administering law for the common welfare. The Mayor of every Illinois city by statute "has the power to call on every male inhabitant of the city over the age of 18 years to aid in enforcing laws and ordinances" (Smith-Hurd Ill. Rev. Stat., Ch. 24, Sec. 9, City and Villages Act). The statutes of this state also provide that when a public official such as a sheriff or mayor refuses to perform his

official duty he may be removed from office (Smith-Hurd Ill. Rev. Stat., Ch. 38, Sec. 449, Criminal Code).

The provision of the Norris-La Guardia Act that an injunction shall not be granted unless it is proved that the public officers are unable or unwilling to furnish adequate protection for complainant's property firmly denies federal jurisdiction for injunctive relief in a labor dispute, until it clearly appears that regularly constituted state officials, including the Governor, are proved unable or unwilling to perform their constitutional and lawful duties. Such a finding requires that such officials have refused, which amounts to an offense on the part of such officials under state law, or that they are unable to provide sufficient protection. There is no showing in this record that any public official of Illinois refused to perform such duties. The legal machinery available to sheriffs and mayors for the preservation of order, together with the constitutional power of the Governor to employ the militia, makes it manifest there was no inability of the public officials to furnish adequate protection for plaintiff's property. The fact that the respective sheriffs did not accede to the request of plaintiff's president to furnish deputies to ride or convoy the railroad trains does not constitute a legal test of the officers' unwillingness or inability to perform their duty. Neither does the fact that some violence occurred, including personal assaults between individuals out of the presence of these officers, show their refusal or inability to furnish adequate protection. Public officials and peace officers are not guarantors against commission of crime or the occurrence of violence, and the mere fact that disturbances occur does not prove such inability or unwillingness.

If the Sheriffs and the City and State officials of Illinois were incompetent or unwilling to protect complainant's property because of 104 striking employees, the property of other Illinois citizens is in peril, but this is not the

case, and the evidence in this record fails to disclose such a breakdown of local and state government.

We suggest it would be salutary for this highest Court of the nation to say that local and state officials may not shift their consfitutional duties to a federal court without making a confession of their incompetency.

IV.

Section 8 of the Norris-La Guardia Act **denies** injunctive relief to any plaintiff who has failed (1) to comply with any obligation imposed by law, or (2) to make every reasonable effort to settle the dispute either by negotiation or with the aid of governmental machinery of mediation or arbitration. The lower courts have erroneously construed this section and improperly found that the evidence showed it had been complied with.

This section (Act of Mar. 23, 1932, Ch. 90, Sec. 8, 47 Stat. 72) provides:

> "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

The pertinent facts under this point are undisputed. Prior to October, 1940, plaintiff's employees were members of a company union. Then the two railroad brotherhoods became the employees' accredited representatives under the terms of the Railway Labor Act. Negotiations for an agreement about pay and working conditions were not successful. The Brotherhoods called a strike for December 9, 1941, which was indefinitely postponed after the attack on Pearl Harbor and declaration of war. On December

17th and again on December 28th an agency of the United States Government, i. e., National Mediation Board, requested both sides to submit to arbitration. The employees agreed, but plaintiff railroad refused. In the District Court plaintiff's attorney Sprague testified (R. 789): "We did refuse to arbitrate in December, as I have already testified, and we have not changed our position in that respect."

On December 21st, when no strike order was in effect, the railroad served notice on the men that its own rates of pay and working conditions would go into effect December 29th. Upon receiving such notice the Brotherhoods had the alternative of yielding to the railroad's demands or withdrawing from service. The strike was a direct result of plaintiff's enforcement of its own demands and its refusal to comply with the request of the government agency for voluntary arbitration. The employees were still working and there was no violence when plaintiff refused to arbitrate at the request of the Mediation Board on December 17th and December 28th. There is no evidence of threats of violence at that time.

The majority opinion (C. C. A.) holds that a complainant fulfills this provision of the Norris-La Guardia Act if it either mediates or negotiates or arbitrates. The opinion also points out that the Railway Labor Act specifies that refusal to arbitrate "shall not be construed as a violation of any legal obligation." The Appeals Court construes this part of the Labor Act to mean that arbitration is not a condition precedent to securing an injunction. The applicable section 8 of the Norris-La Guardia Act prohibits an injunction to a complainant who has failed to comply with any obligation imposed by law or to make every reasonable effort to settle the dispute **either** by negotiation or with the aid of any governmental machinery for mediation or voluntary arbitration.

It is suggested that the plain meaning of the statute does not sustain the distinction or construction of the majority opinion. The clear intent of Congress was to induce settlement without resort to the courts and adjustment without work stoppages. As pointed out in the dissenting opinion, if plaintiff had submitted to the request for arbitration the strike would have been avoided.

It must be presumed that a governmental agency would be fair, just and impartial in the conduct of the arbitration. Plaintiff offered no explanation or justification for its inflexible refusal to respond to the Government's request and its refusal was made at a time when the nation was at war. We do not contend that the railroad here was under legal compulsion to submit to arbitration, but we do say that when a complainant does an act which provokes a strike (giving notice that its own working conditions would be effective December 29th), and, in addition, stubbornly refuses the requested co-operation of the Government when such refusal is not explained, such a complainant is not in such a state of equity to justify equitable relief in its behalf by a federal court, and in these circumstances that an injunction is forbidden by the Norris-La Guardia Act.

Respectfully submitted,

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